

ARKANSAS SUPREME COURT

No. CR 86-206

HERBERT PHILLIP MALONE
Petitioner

v.

STATE OF ARKANSAS
Respondent

Opinion Delivered April 26, 2007

PRO SE PETITION TO REINVEST
JURISDICTION IN THE TRIAL COURT
TO CONSIDER A PETITION FOR WRIT
OF ERROR CORAM NOBIS [CIRCUIT
COURT OF PULASKI COUNTY, CR 86-
841]

PETITION DENIED.

PER CURIAM

In 1986, petitioner Herbert Phillip Malone was found guilty by a jury of aggravated robbery, aggravated assault, and theft of property and sentenced as a habitual offender to an aggregate term of 348 years' imprisonment. We affirmed. *Malone v. State*, 292 Ark. 243, 729 S.W.2d 167 (1987). Subsequently, petitioner timely filed in this court a pro se petition seeking leave to proceed in the trial court with a petition pursuant to Ark. R. Crim. P. Rule 37.1.¹ The petition was denied. *Malone v. State*, 294 Ark. 127, 741 S.W.2d 246 (1987) (per curiam).

Petitioner now asks that this court reinvest jurisdiction in the trial court to consider a petition

¹Prior to July 1, 1989, a petitioner whose judgment of conviction had been affirmed on appeal was required to petition this court for relief under Criminal Procedure Rule 37.1 and gain leave from this court to proceed under the rule in the circuit court before filing a petition there. Criminal Procedure Rule 37 was abolished by this court effective July 1, 1989. *In the Matter of the Abolishment of Rule 37 and the Revision of Rule 36 of the Arkansas Rules of Criminal Procedure*, 299 Ark. Appx. 573, 770 S.W.2d 148 (1989) (per curiam). Rule 37 was reinstated in a revised form on January 1, 1991. *In the Matter of the Reinstatement of Rule 37 of the Arkansas Rules of Criminal Procedure*, 303 Ark. Appx. 746, 797 S.W.2d 458 (1990) (per curiam). The revised rule does not require petitioners to gain leave of this court before proceeding in the trial court.

for writ of error coram nobis.² The petition for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis after a judgment has been affirmed on appeal only after we grant permission. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam).

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Larimore v. State*, 341 Ark. 397, 17 S.W.3d 87 (2000). The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam). These fundamental errors are found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal. *Pitts, supra, citing Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984). Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. Newly discovered evidence in itself is not a basis for relief under coram nobis. *Larimore, supra; Smith v. State*, 301 Ark. 374, 784 S.W.2d 595 (1990). Finally, coram nobis proceedings require the petitioner to show that he proceeded with due diligence in making application for relief. *See Penn, supra, citing Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975). After reviewing the instant petition, we do not find that petitioner has stated good cause to grant leave to proceed with a petition for writ of error coram nobis in the trial court.

Petitioner contends that he is entitled to issuance of the writ on the ground that his sentence

²For clerical purposes, the instant petition to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis was assigned the same docket number as the direct appeal of the judgment.

of 348 years' imprisonment was in excess of that imposed on any other person in Arkansas charged with the same offenses as he, exceeded the life span of any human being, and was outside the range of sentences allowed by law. This court rejected the same argument when petitioner raised it in his petition for postconviction relief pursuant to Rule 37.1. *Malone*, 294 Ark. at 30. A coram nobis proceeding is not an opportunity to revisit claims for postconviction relief. *See McArty v. State*, 335 Ark. 445, 983 S.W.2d 418 (1998) (per curiam).

Petitioner next alludes to an "incontrovertible document" that existed at the time of his trial but was unavailable to him and appears to suggest that the unavailability of the document denied him the right to mount a complete defense at trial. In an affidavit appended to the petition, he states that the document has only recently become public and concerns "the political nature and reputations of the parties involved." He offers no further information on the nature of the document and gives no explanation of how it would have aided his defense. While he suggests that the document was kept from him, he does not contend that the prosecution or any specific person or entity withheld the document from the defense.

The Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. As petitioner does not allege that the prosecution withheld evidence from him, he has not demonstrated that there was a *Brady* violation in his case.

Petition denied.